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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

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MM Docket No. 92-266

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.

SUMMARY

At issue in the Further Notice is whether, in establishing benchmarks for regulating cable television systems' basic and non-basic rates based on the rates charged by systems subject to "effective competition," the Commission should exclude from its analysis the rates of some systems that meet the explicit statutory definition of effective competition -- specifically, systems with penetration of less than 30 percent. There is no basis in law or logic for excluding such systems.

The Cable Television Consumer Protection and Competition Act (the "Act") directs the Commission, in establishing regulatory standards, to take into account, among other factors, the rates of systems subject to effective competition, and the Act specifically defines such systems to include those with penetration of less than 30 percent.

In such circumstances, the Commission has no authority to exclude such systems from its

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consideration simply because, in its view, they should not be deemed subject to effective competition.

Furthermore, the mere fact that rates of systems with penetration of less than 30 percent are higher, on average, than rates of systems with head-to-head competition from other cable systems or the rates of municipally owned systems provides no basis for excluding the former systems rather than the latter. Because overbuild competition frequently results in short-term price wars and efforts of "greenmail", and because municipally owned systems typically are not profit-oriented, it is more likely that the rates in those situations are below competitive levels -- i.e., below levels necessary to recover costs plus a reasonable profit -- than that rates of systems with less than 30 percent penetration are above such levels.

INTRODUCTION

In its Report and Order in this proceeding, the Commission adopted rules that were meant to implement the rate regulation provisions of the Act. Those provisions established a new dual regulatory framework under which local franchising authorities and the Commission were empowered to regulate rates charged by cable television systems. Only systems not subject to "effective competition" are subject to rate regulation under the Act. And only services offered solely on a packaged or tiered basis are subject to regulation.

Franchising authorities may regulate rates for basic cable service -- the tier of service that must be provided to all subscribers and that must include, at a minimum, all broadcast stations (other than "superstations") and all public, educational and governmental access channels carried by a system. To exercise such regulatory authority, a franchising authority must certify to the Commission that it has the legal authority and the resources to regulate rates and that it will regulate in accordance with the Commission's standards. The standards are to be designed in a way that ensures that a system's basic rates are "reasonable" and, specifically, that the rates do not exceed what

the system would charge if it were subject to effective competition. If the Commission rejects or revokes the franchising authority's certification, then the Commission must itself regulate basic rates.

Rates for non-basic tiers of "cable programming services" are subject to a different regulatory mechanism. Neither local franchising authorities nor the Commission are empowered to regulate those rates directly; cable operators are not required to submit their existing rates for regulatory approval or to obtain such approval before increasing their rates. But rates for non-basic tiers are subject to complaints from subscribers and franchising authorities, and the Commission is required to resolve such complaints. If the Commission determines that a system's non-basic rates are "unreasonable", it can order that they be reduced to an appropriate level. In adopting standards for determining whether non-basic rates are "unreasonable", the Commission is to take into account a number of factors, including but not limited to the rates charged by systems that are subject to effective competition.

In its Report and Order, the Commission decided to adopt identical standards for determining whether basic rates are "reasonable" and whether non-basic rates are "unreasonable." In both cases, the Commission will rely on "benchmarks" that are based upon the average rates charged by systems subject to effective competition. If a system's rates for basic or non-basic tiers of service are, on a per-channel basis, higher than the benchmark rate -- if they are higher than what systems subject to effective competition charge, on average, for comparable programming -- then they will be subject to rate reductions.

According to the Commission, the rates charged by systems that are subject to effective competition, as that term is defined in the Act, are approximately ten percent less than the rates charged by systems that are not subject to effective competition. The benchmarks reflect this ten percent competitive adjustment, and the Commission will require that, where rates for a particular tier are above the benchmark, they can be

reduced to the benchmark or to ten percent less than the system's overall per-channel rate for basic and non-basic tiers as of September 30, 1992, whichever is the lesser reduction.

But under the Act's definition, there are several different circumstances under which a system may be subject to effective competition, and it appears the average rates charged by systems subject to one form of effective competition may be significantly different from the average rates charged by systems subject to another form of effective competition. Systems are subject to effective competition, under the Act, if

- (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
- (B) the franchise area is--
 - (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
 - (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceed 15 percent of the households in the franchise area; or
- (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.¹

The Commission contends that if systems with penetration of less than 30 percent were excluded from the set of systems deemed subject to effective competition, average rates for systems subject to effective competition would be 28 percent less than rates for systems not subject to effective competition. In its Further Notice, the Commission asks whether it should exclude systems with penetration of less than 30 percent from its survey

¹ Sec. 623(l)(1)

of systems subject to effective competition and whether it should, as a result, adopt new, lower benchmarks and require further rate reductions so that, on average, rates are reduced an additional 18 percent.

As we now show, such action would be wholly unwarranted. Congress directed the Commission, in fashioning standards for regulatory basic and non-basic rates, to take into account the rates of systems subject to effective competition and, with respect to basic service, to ensure that a system's rates do not exceed what the system would charge

designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.²

And, in developing such standards, the Commission is specifically directed to take into account, among other factors, "the rates for cable systems, if any, that are subject to effective competition."³ The Commission is also required to consider "the rates for cable systems, if any, that are subject to effective competition" in establishing criteria for determining, on a case-by-case basis, whether rates for non-basic "cable programming services" are "unreasonable"⁴ -- although there is no specific directive, as in the case of basic rate regulation, that the Commission ensure that rates for non-basic tiers not exceed rates charged by systems subject to effective competition.⁵

² Sec. 623(b)(1) (emphasis added).

³ Sec. 623(b)(2)(C) (emphasis added).

⁴ Sec. 623(c)(2).

⁵ Indeed, in fashioning the criteria for assessing non-basic rate complaints, the Commission is required to consider, in addition to the rates of systems facing effective competition,

the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors.

Id. The Commission is also required to consider "the rates, as a whole, for all the cable programming provided by the system, other than programming provided on a per-channel or per-program basis." Id. (emphasis added).

In other words, in determining whether a system's non-basic rates are "unreasonable," the Commission is supposed to take into account the extent to which those rates exceed the norm for all systems -- not just systems subject to effective competition. And it is supposed to consider the overall rates charged by the system for basic and non-basic tiers -- not just the rates for non-basic "cable programming services."

Congress not only directed the Commission to restrict basic rates to the levels charged by systems subject to effective competition, and to take into account the rates charged by such systems in devising standards for regulatory basic and non-basic rates. It also defined with specificity which systems should be deemed to be subject to effective competition for these purposes. The Commission is not free to disregard or depart from this statutory definition simply because some of the systems covered by the definition do not seem to meet the Commission's definition of a system subject to effective competition.

This was precisely the issue on which the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's rules implementing the rate regulation provisions of the Cable Communications Policy Act of 1984:

That issue may be simply stated: Does the FCC enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with a definition of that very term contained in the Act itself? The question, we believe, answers itself. The Commission, however, answers yes.⁶

The disputed term, in that case, was "basic cable service" -- a key term, since only rates for "basic cable service" were, under the 1994 Act, subject to rate regulation. The Act defined the term to include "any service tier which includes the retransmission of local television broadcast signals."⁷ If a cable operator chose to offer a small tier of

The Commission followed neither of these directives. It established identical benchmark standards, based solely on rates charged by systems subject to effective competition, for both basic and non-basic rates. And, in determining whether a system's non-basic rates are unreasonable, the Commission will take no account of the system's basic rates -- and, in particular, of whether those basic rates are lower than benchmark levels. NCTA will petition the Commission to reconsider these and other aspects of its decision.

⁶ American Civil Liberties Union v. FCC, 823 F.2d 1554, 1567 (D.C. Cir. 1987).

⁷ Id. at 1565.

channels including the local broadcast signals and also to offer a larger tier, which included all the channels included in the small tier plus additional satellite signals, at a single, higher price, then both tiers would, under the Act's definition, be "basic cable service" tiers -- and rates for both tiers would be subject to regulation. On the other hand, if the operator marketed these services differently -- if the small tier were offered in the same way, but the additional satellite signals were offered in a separate tier, which did not include the broadcast services provided on the first tier -- then only the first tier would be deemed "basic cable service," even though the options and prices available to subscribers were, in effect, the same in both cases.

The Commission decided that there was no reason to regulate the two situations differently and that to do so "would represent a triumph of form over substance."⁸ Moreover, there was clear legislative history indicating that the statutory definition was meant only to apply during a two year transition period, after which the Commission would have discretion to redefine the term. Therefore, the Commission did redefine the term, so that, after the transition period, it would encompass only the tier of service "regularly provided to all subscribers" that included all local broadcast signals; it would not encompass additional cumulative tiers that also included the broadcast signals.

The court held that, notwithstanding the legislative history that seemed to support the Commission's authority to redefine "basic cable service," the statutory definition was itself clear and unambiguous and could not be overridden by legislative history:

Turning to the language of the statute, we find that on the issue of defining "basic cable service," the statute speaks with crystalline clarity. It provides a precise definition in section 602(2) for the exact term the Commission now seeks to redefine. The statute in no wise indicates that the 602(2) definition is only transitory. From the face of the statute then, we are left

⁸ Id. at 1567.

with no ambiguity and thus no need to resort to legislative history for clarification.⁹

In the present case, the statutory definition of "effective competition" is of equally crystalline clarity -- and there is no legislative history anywhere that suggests that the Commission might, in any circumstances, redefine the term. If the Commission was not permitted to redefine "basic cable service" under the 1984 Act even where the legislative history seemed to contemplate such a redefinition, then surely it is not permitted to depart from the clear statutory definition of "effective competition" under the 1992 Act, where the legislative history provides no support whatever for such a departure.

Congress not only directed the Commission to base standards upon the rates charged by systems subject to effective competition; it also clearly defined the circumstances under which systems should be deemed subject to effective competition. The Commission may not second-guess Congress and may not exclude systems with penetration of less than 30 percent simply because, in its view, those systems are not subject to effective competition or because excluding such systems will result in lower benchmarks.¹⁰

⁹ Id. at 1568.

¹⁰ In Chevron, USA v. NRDC, 467 U.S. 837, 842-43, the Supreme Court instructed that

[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

(Emphasis added.) Thus, as the Court of Appeals held in ACLU, supra, "[i]t is only if Congress' intent is 'silent or ambiguous' that we consider, and grant deference to, the agency's construction." 823 F.2d at 1554, quoting Chevron, supra, 467 U.S. at 843.

II. It Is At Least As Likely That Rates of Systems Facing Head-to-Head Competition Are Below "Competitive" Levels As That Rates of Systems With Penetration Less Than 30% Are Above "Competitive" Levels.

Even if the Commission had authority to redefine "effective competition", it would have no logical or factual basis for excluding systems with penetration of less than 30 percent in establishing competitive benchmarks. The mere fact that the rates charged by such systems are, on average, higher than the rates charged by systems facing head-to-head competition from other multichannel distributors does not mean that excluding such systems would "produce a better measure of competitive rate differential."¹¹

Excluding such systems would, to be sure, result in lower benchmarks and a larger differential. But there is no reason to conclude that such benchmarks would more accurately reflect "competitive" rates. To the contrary, rates charged by systems facing head-to-head competition are often below "competitive" levels -- i.e., below what is necessary to cover costs plus a reasonable profit. Because such systems represent the majority of the Commission's sample of systems facing "effective competition", the benchmarks are already too low -- and the 10% competitive adjustment is already too large -- to allow cable systems to charge reasonable rates and earn reasonable profits. Excluding systems with penetration of less than 30% will drive the benchmarks even lower, requiring most cable systems to rely on cost-of-service showings for their survival.

The Commission's Further Notice provides scant support for excluding systems with less than 30 percent penetration. It asserts only that:

the low penetration of cable systems in some areas may be attributable to factors other than the presence of competing video distribution services. Cable systems may have low penetration, for example, because they are in the process of being constructed, because costs of providing service in the

area are high, making service affordable to fewer potential subscribers, or because of poor business management decisions.¹²

But while there may be hypothetical reasons why some systems with penetration below 30 percent should not necessarily be expected to charge "competitive" rates, there are compelling reasons why systems facing head-to-head cable competition should not be expected to charge "competitive" rates -- and, in these cases, the rates are likely to be


arbitrarily the already low benchmarks to levels even further below what is necessary to cover costs and earn reasonable profits.

CONCLUSION

For the foregoing reasons, the Commission should not exclude systems with penetration of less than 30 percent in calculating its benchmarks. To do so would be contrary to the Act and would be arbitrary and capricious.

Respectfully submitted,

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